BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINIONS OF THE COURTS BELOW.

The opinion of the Court of Appeals for the Sixth Circuit below is styled "Brewer R. Chapman, et als., vs. Home Ice Company, et als., and has not yet been published in the Reporter, but is found copied in the record at page 77, (R. p. 77).

The opinion of the District Court is also styled "Chapman vs. Home Ice Company," reported in 43 Fed. Supp. 423, and is copied in the record at page 46. (R. p. 46).

GROUNDS OF JURISDICTION.

Jurisdiction of this Court is invoked in that petitioner has no right of appeal or writ of error to this Court and by virtue of the provisions of Section 240 of the Judicial Code of the United States, as amended, shown in Title 28, U.S.C.A., Section 347, and the provisions of the Act of Congress of February 13, 1925.

STATEMENT OF THE CASE.

The plaintiffs and intervenors filed their claims for underpayment of wages under Sections 6 and 7 of the Fair Labor Standards Act of June 25, 1938. They claimed that they were underpaid as to amount and overworked as to hours by working for the petitioner defendant as employees of its ice factory in Memphis, Tennessee. The Home Ice Company leased a number of ice factory plants and sold its entire output in Shelby County, Tennessee. Of this ice, since the coverage of the Act, out of a total of 121,846 tons, 2605 tons, or 2.13%, was

sold to railroads to cool and furnish ice in passenger cars; 1404 tons, or 1.15% was sold to refrigerate cars to preserve perishable freight; 4283 tons, or 3.51% to Memphis merchants to refrigerate perishable freight. Most of these, in turn, later traveled in interstate commerce, but the sale and delivery was wholly in Memphis. Of this 6.80% total, none was manufactured for this or any other specific purpose, but 2% of it was defective ice, called "white ice," not intended to be manufactured at all, but which was usable and salable for car refrigeration. Thus 4.80% was manufactured for sale generally, while 2% was of defective manufacture, sold by way of salvage. (Findings of Fact, R. p. 59; Opinion Court of Appeals, R. p. 78).

It was only in the sale and production of this ice, ultimately sold for passenger and car refrigeration, that the plaintiffs and intervenors claimed to have worked in interstate commerce, so that the first question is whether or not these occasional and incidental sales for car refrigeration constituted them employees either engaged in, or producing goods for, interstate commerce.

The services of plaintiffs and intervenors under this record must have consisted in aiding in delivering the ice sold by their employer, by driving the ice truck, delivering, loading or unloading the ice, or aiding in its production when the ice was either intended for, or sold and delivered for passenger consumption or car refrigeration.

ENGAGED IN COMMERCE.

The plaintiffs and intervenors, John Scribner, Joe Johnson, Jr., and Will Brown only, of their number, took part in the delivery, loading and unloading of the ice for passenger consumption or car refrigeration, as shown in the petition and later in this brief.

After Motion to Dismiss was overruled in the District Court the whole case was heard on oral proof and an opinion and findings of fact were filed. (R. p. 23; Opinion District Court, R. p. 46; Findings of Fact, R. p. 57; Judgment of District Court, R. p. 61.)

The District Court found the answer to be true in these words:

> "The dates, time and character of the work and services of each of these employees, the hours employed and the rate of pay, are correctly set out in detail in the answer of Home Ice Company, defendant, for further details of which reference is here made."
>
> Findings of Fact, R. p. 58.

No proof is contained in the record so that the Answer and Findings of Fact constitute the entire proof in the case. (Designations of Record, R. p. 75-76).

These three claims for 62-1/2c and an equal amount of damages constitute the entire claims of the plaintiffs and intervenors for being engaged in interstate commerce.

PRODUCTION OF GOODS FOR COMMERCE.

Home Ice Company made ice in a number of plants. During the time that plaintiffs and intervenors were employed some of these plants made ice which ultimately went into passenger consumption and car refrigeration. Some never did. The District Court found, not only that the answer was true, but that "the plants where each of the plaintiffs worked, and whether or not they at any time herein involved manufactured ice which ultimately went into sale for car refrigeration, are definitely shown by the proof." (R. p. 59).

Of the plaintiffs and intervenors, the following never worked at an ice plant which made ice that was sold for passenger consumption or car refrigeration:

Brewer R. Chapman, with the possible exception that not exceeding 6% of the McKinnon and Normal ice plants' output was "white ice" and an amount unknown was sold for car refrigeration, and another plant made ice for a Shrine convention that iced Pullman cars where the Shriners slept while stationary in Memphis.

Ans. R. pp. 26-29.

Dave Love. No ice at any of the plants where Love worked was sold for car refrigeration.

Findings of Fact, R. p. 58.

John Scribner, worked on no ice which was intended for or ultimately sold for passenger consumption or car refrigeration.

Ans. R. p. 37;

Findings of Fact, R. p. 58.

Will Brown, worked at Electric Ice Plant, which at undefined times produced ice for car refrigeration. He could have worked on ice that went into passenger consumption or car refrigeration, but did not.

Findings of Fact, R. p. 58.

Joe Johnson, Jr., is the only remaining plaintiff or intervenor who worked at plants which, at undefined and unidentified times, produced ice some of which ultimately went into car refrigeration. No connection is shown between his work and ice that went to passenger consumption or car refrigeration.

As to Joe Johnson, Jr., the District Court, in addition to finding the answer to be true, found:

> "The proof is wholly silent as to whether at or about the time of any plaintiff's employment the plant where he worked was engaged in the production of ice, any of which was intended to be sold or which was ultimately sold for any car refrigeration."
>
> Findings of Fact, R. pp. 59-60.

The five plaintiffs and intervenors just mentioned are the only ones who appealed to the Court of Appeals. That Court reversed the District Court upon the Answer, found to be true, and the Findings of Fact as to all of the plaintiffs and intervenors, without discrimination between the case of Chapman, Love, Scribner, Brown and Johnson, all of which were based upon entirely different situations.

Opinion Court of Appeals, pp. 77-82;
Judgment Court of Appeals, p. 77.

There is no controversy of the facts, and small room for differences in the conclusions. Scribner, Johnson and Brown aided their employer in completing its sale by the delivery of ice to receptacles in cars. It was a completion of the sale by the employer. It also placed the ice in the cars for the carrier. By doing the primary work for the employer in delivering ice, these employees incidentally helped the carriers receive it into their cars. In completing an intrastate transaction the employees incidentally aided an interstate transaction. The service was primarily for the employer and incidentally served the buyer of the ice. The plaintiffs, Chapman and Dave Love, worked on ice that could not, under the proof, have been intended for or gone into car refrigeration. Plainly, therefore, they could not recover.

Joe Johnson, Jr., and Will Brown might have had a case of aiding in the production of ice which ultimately went to passenger consumption or car refrigeration if they had proved it. They did not prove it and there is no proof on the subject, or it is against them.

Findings of Fact, R. pp. 58, 59.

SPECIFICATION OF ERRORS. ASSIGNMENTS.

The Court of Appeals for the Sixth Circuit erred in:

1. Holding that plaintiffs and intervenors, John Scribner, Will Brown and Joe Johnson, Jr., were either engaged in interstate commerce or in the production of goods for interstate commerce by aiding in the delivery into the receptacles of cars in Memphis ice sold by their employer to packers and carriers and in holding that the delivery of such ice was engaging in the production of goods for commerce.

In aiding in the delivery of ice sold by their employer, Scribner, Brown and Johnson were merely completing the delivery of an intrastate sale for their employer which had the effect of placing the ice where the purchaser wanted it, after which the purchaser moved it. The delivery was exactly as if a local seller had delivered ice into a local housekeeper's ice box. The primary function was intrastate. It had the effect of aiding a later interstate movement.

Ans. R. pp. 30, 37, 39;
Findings of Fact, R. p. 58;
Judgment, Court of Appeals, R. p. 77;
Opinion Court of Appeals, R. pp. 77, 81.

2. Reversing the District Court in dismissing the suits of said Scribner, Brown and Johnson and holding they were entitled to a new trial in view of their work, and especially in view of the fact that the claims for deficiency in interstate commerce only amounted to 6-1/4c, 30c and 26-1/4c, a total of 62-1/2c, which, with liquidated damages, would only have made $1.25.

Ans. R. pp. 30, 37, 39;
Findings of Fact, R. p. 58;
Judgment of District Court, R. p. 61;
Judgment and Opinion Court of Appeals, R. p. 77.

3. Holding that occasional incidental local sales of defendant ice factory of 6.80% of its output to passenger consumption and car refrigeration service amounts to the production of such ice for interstate commerce because that ice is used as a utility in interstate transportation.

Opinion Court of Appeals, R. p. 77;
Judgment Court of Appeals, R. p. 77.

4. Failing to hold that ice sold and delivered to carriers and packers for consumption by passengers and car refrigeration is delivered into the actual physical possession of such carrier or packer as the ultimate consumer thereof before its entrance into interstate commerce and, therefore, failing to hold that it was thereby excluded from the provisions of the Fair Labor Standards Act, under Section 3(i) thereof, and in holding that the exclusion of Section 3(i) from the provisions of Sections 6 and 7 of that Act did not apply to a wholly local sale and delivery of ice to a carrier or packer for the purpose of melting and consuming that ice as a refrigerant during an interstate journey.

Opinion Court of Appeals, R. pp. 77, 80, 81.

5. Failing to hold that the burden of proof was on the plaintiffs and intervenors to show that they aided in producing ice which was intended for or ultimately went into either passenger consumption or car refrigeration, or to show in proof any unit or other measure of time by which their work in such production could be valued and determined. This holding was urged upon the Court of Appeals in petitioner's two briefs filed therein.

Appendix "A" to Petition for Certiorari, Brief for the Appellee, pp. 35-39, 41;

Appendix "B" to Petition for Certiorari, Appellee's Reply Brief to the Solicitor of Labor, pp. 2, 3.

Opinion and Judgment Court of Appeals, R. p. 77.

6. Ignoring and failing to pass upon whether any plaintiff or intervenor had worked in producing ice for passenger consumption or car refrigeration.

The Court of Appeals reversed the case for each petitioner and intervenor, without differentiating among them or passing upon the defenses that none of them had aided in producing any goods whatsoever that went either for passenger consumption or car refrigeration.

This reversal left undetermined principal and determinative questions in the lawsuits and on the appeal. A correct determination of them would have resulted in an affirmance of the District Court, regardless of whether he was correct or incorrect on other questions. The failure to pass upon them was fatal to the petitioner's defense. These matters were pressed upon the Court of Appeals.

Appendix "A" to Petition for Certiorari. Brief for the Appellee, pp. 23. 36-39, 39-41;
Appendix "B" to Petition for Certiorari, Appellee's Reply Brief to the Solicitor of Labor, pp. 1-4;
Opinion Court of Appeals, R. p. 77;
Judgment Court of Appeals, R. p. 77.

7. Failing to affirm the decision of the District Court because it was correct, after hearing of the whole case, even though the District Court gave a wrong reason for its action. The decision was correct, independent and apart from the District Court's reasoning and grounds because no plaintiff or intervenor showed or could show that his work was either in interstate commerce or was in the production of goods for interstate commerce, or was work in the production of goods which were destined or intended for or ultimately went, or was sold for, passenger consumption or car refrigeration.

Ans. R. pp. 26-29, 30, 37, 39;
Findings of Fact, R. pp. 58, 59, 60;
Opinion Court of Appeals, R. pp. 77-82;
Judgment Court of Appeals, R. p. 77.

ARGUMENT.

POINTS OF LAW AND FACT.

I

LAW

1. The basis of these suits is Sections 6 and 7 of the Fair Labor Standards Act of 1925, approved June 25, 1925, 52 Statutes, 1060, Title 29 U. S. Code Annotated, Sections 206 and 207.

2. The terms used in the Act are defined in Section 3 (Sec. 203 in U.S.C.A.) of the Act and these definitions govern the entire Act, not just a portion of it, by saying:

Definitions—

As used in this Act: (Sections 201 to 219 of this title in Sec. 203 of U.S.C.A.)

> "(b) *'Commerce'* means trade, commerce, transportation, etc., * * * among the several States or from any State to any place outside thereof." (Hereinafter called Interstate Commerce.)
>
> "(c) *'State'* means any State of the United States or the District of Columbia or any Territory or possession of the United States."
>
> * * * * * *
>
> "(i) *'Goods'* means goods, etc., * * * but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."
>
> "(j) *'Produced'* means produced, manufactured, mined, handled or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged

in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof."

Fair Labor Standards Act, Sec. 3, Title 29, U.S.C.A., Sec. 203.

The definitions important to this case are that the word "commerce" is always read "interstate commerce"; the word "goods" always means and is read "goods for interstate commerce"; and the word "produced" means not only manufactured, mined and worked on, but means working in any process necessary to the *production* of such goods, but does not mean employed in any business necessary to the *transportation* of such goods.

As applicable to this case, and as defined, Sections 6 and 7 of the Act (being Sections 206 and 207 of Title 29, U.S.C.A.) read this way:

Section 206 (Section 6 of the Act):

"Minimum wages; effective date:

(a) Every employer shall pay to each of his employees who is engaged in interstate commerce or in the production of goods for interstate commerce (but not including goods for interstate commerce after their delivery into the actual physical possession of the ultimate consumer thereof) wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents on hour,

(2) during the next six years from such date, not less than 30 cents an hour."

Section 207 (Sec. 7 of the Act):

"Maximum hours—

(a) No employer shall * * * employ any of his employees, who is engaged in interstate commerce or in the production of goods for interstate commerce, (but not including goods for interstate commerce after their delivery into the actual physical possession of the ultimate consumer thereof)—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed."

Read in accordance with the plain definitions written in by the Act, any uncertainty as to the meaning of the exclusion in Section 3(i) disappears.

The goods not included are goods which enter into interstate commerce after their delivery into the physical possession of the ultimate consumer. The time governing the jurisdiction of the Act and of Congress is the time of the entry of the goods into interstate commerce. The Act plainly means that if they have already been delivered to the ultimate consumer they are outside the Act because the transaction is concluded before they enter interstate commerce. If they enter interstate commerce beforehand, their delivery thereafter to the ultimate consumer leaves them within the Act.

FACT

The ice here sold and delivered went for the purpose of being consumed by passengers or melted in the transportation of goods which it preserved. It was thus consumed in the use while aboard the cars and so could not possibly have been made the instrument of competition in its disposition, even though it was produced under sub-standard labor conditions.

LAW

In *United States vs. Darby Lbr. Co.,* 312 U. S., 100, this Court said, in reference to this Act:

> "The motive and purpose of the present regulation is plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows."

The ice here involved was sold in order to be consumed by passengers, or melted in the transportation of the goods which it preserved. It was thus consumed in the use while aboard the cars and, therefore, could not possibly have been made the instrument of competition in its distribution. It was, therefore, not within the principles or purposes of the Darby case.

II

FACT

The services sued for must have been either in interstate commerce or in the production of goods for interstate commerce, and, therefore, divide themselves into two classes:

1. *Engaged in commerce by delivering ice into railroad cars.* They were (if within the Act):

John Scribner, delivering ice, 1-1/4 hours, underpayment		6-1/4c
Will Brown, hauling ice, 3 hours, underpaid 10c an hour,		30c
Joe Johnson, loading ice, 1-1/4 hours, underpaid 5c per hour	6-1/4c	
2 hours, underpaid 10c an hour,	20c	26-1/4c
Total,		62-1/2c

Ans. R. pp. 30, 37, 39,
Findings of Fact, R. p. 58.

LAW

1. These amounts are too infinitesimal to be the subject of a lawsuit, but come under the rule *de minimis*. It is only where the matters involved bear a substantial relation to interstate commerce that the courts take cognizance of them as affecting that commerce.

Congress is supposed to have excluded commerce of inconsequential value from the operation of regulatory measures.

National Relations Board vs. Fainblatt, 306 U. S. 601.

2. The delivery of this ice was not engaging in interstate commerce, even though it accomplished some work which the carriers needed to have done in aid of transportation.

The employee was delivering ice in completion and consummation of a local sale made by his employer to a carrier just as an ice vendor delivers ice into a family's ice box. In completing that sale, which would be in intrastate commerce, he placed the ice where the carrier did want it, but the work done was in the service of the seller in completing the sale by delivery. The advantage to the carrier was only the effect of the completion of that sale. While the work done did result to the benefit of the carrier, it was not done for the carrier. It only resulted in benefit to the carrier, but the work was done for the seller of the ice. This Court dealt with that situation in *Kirschbaum vs. Walling,* 316 U. S. 517, where the lower court found this act applied to employees "because their work was in kind substantially the same as it would be if the manufacturers employed them directly." This Court said:

> "In the immediate situation, the answer may be adequate; but as a guiding criterion it may prove too much. 'Necessary' is colored by the context not only of the terms of this legislation but of its implications in the relation between state and national authority. We cannot, in construing the word 'necessary,' escape an inquiry into the relationship of the particular employees to the production of goods for commerce. If the work of the employees has only the most tenuous relation to, and is not in any fitting sense 'necessary' to the production, it is immaterial that their activities would be substantially the

same if the employees worked directly for the producers of goods for commerce."

Kirschbaum vs. Walling, 316 U. S. 517, at 520.

The tie with the work of the employer in delivering the ice as a completion of the sale was primary, immediate and connecting. The work of that employee in placing the ice for his employer in the receptacles of the carrier only had the effect of delivering the ice where the carrier happened to need it. The employee was engaged in completing the local sale of his employer's ice, not in loading the carrier's cars, except as a result of the delivery.

III

FACT

1. Appellants, Chapman, Scribner and Brown (except three hours) could not have engaged in producing ice for passenger consumption or car refrigeration because the plants where they worked produced none.

Ans. R. pp. 26-29, 37;
Findings of Fact, R. p. 58.

Appellant, Dave Love, could have worked at producing such ice, but did not.

Findings of Fact, R. p. 58.

Appellant, Joe Johnson, Jr., could have engaged in such work but failed to offer proof with reference to it. Neither he nor the others offered any proof that showed their connection with ice, either intended for or that went to passenger consumption or car refrigeration.

Findings of Fact, R. pp. 59, 60.

So, no appellant showed any connection with any ice that was intended for or went to passenger consumption or car refrigeration or that characterized them as employees in any way with interstate commerce.

2. There is neither averment by plaintiffs nor intervenors, nor admission by the defendant that Joe Johnson, Jr., or any other plaintiff or intervenor aided in producing goods intended for, or ultimately sold for, passenger consumption or car refrigeration. The Wage and Hour Administrator has taken each week as a unit of labor. The week may be taken as a unit here. There is no method, computed weekly or on any other basis, by which Joe Johnson's (or any other plaintiff's or intervenor's) underpayment or overhours can be ascertained for purposes of judgment.

Complaint, R. pp. 1-6;
Intervening Complaint, R. pp. 6-13;
Amendment to Complaint, R. pp. 21-23;
Answer, R. pp. 24-43, 44-45.

LAW

A plaintiff who works in an occupation, some of which is classed as interstate commerce, and some of which is not, must point out what part of his work was in interstate commerce.

The burden was on the plaintiffs and intervenors to prove that in the course of performing their services for petitioner, and without regard to the nature of petitioner's business, they were, as employees, engaged in the production of goods within the meaning of the Fair Labor Standards Act and that such production was for interstate commerce.

Warren-Bradshaw Drilling Co. vs. Hall, 317 U. S. 88;

Super-Cold Southwest Co. vs. McBride, 124 Fed. (2d) 90;
Jewel Tea Co. vs. Williams, 118 Fed. (2d) 202.

It is true that there is a presumption in criminal cases that any employee who was engaged in a place of employment within ninety days prior to the removal of the goods produced them, but that applies alone to criminal cases and there is no proof in this case as to when the goods were removed, therefore there is no time from which to compute the ninety days. The Fair Labor Standards Act says:

> "(b) For the purposes of subsection (a) (1) (the crime defined) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods."
>
> Fair Labor Standards Act, Section 15 (b) Title 29, U.S.C.A., Sec. 215 (b) 52 Stat. 1068.

Attention is called that this presumption is expressly limited to sub-section a-1 of Section 215, in contrast to the language of Section 203, which, instead of limiting its definitions, expressly says they are applied to the entire Act, that is, Sections 201-219, Title 29, U.S.C.A., Sec. 203, (Section 3 of Act).

This tends to demonstrate that the definition of "goods for interstate commerce" excluded by the definition in Section 3(i) (203 (i)) applies to the whole act instead of only the criminal penalty of Section 15.

IV

FACT

1. The rightfulness of the District Court's decision in dismissing the cases was argued, stressed and pointed out by this petitioner to the Court of Appeals.

Appendix "A" to Petition for Certiorari, Brief for the Appellee, pp. 23, 35-39, 39-41;
Appendix "B" to Petition for Certiorari, Appellee's Reply Brief, pp. 1-4.

The Court of Appeals reversed the case and remanded it for a new trial, without considering or determining whether or not any plaintiff or intervenor had aided in the production of ice either intended or sold for, or which went to, passenger consumption or car refrigeration and did not differentiate among the plaintiffs. It merely held that locally selling ice for passenger consumption or car refrigeration constituted production of ice for interstate commerce. It left undetermined controlling questions in the case upon which the decisions below should have been affirmed.

Opinion Court of Appeals, R. pp. 77-81;
Judgment Court of Appeals, R. p. 77.

LAW

1. Where the decision of a District Court is correct it must be affirmed by the Court of Appeals, even though the District Court gave a wrong reason for its action.

J. E. Riley Investment Company vs. Commissioner of Internal Revenue, 311 U. S. 55.

2. The petitioner (appellee below) was entitled to urge in the Court of Appeals that on the undisputed facts the District Court's decision was correct, even though

the District Court gave a wrong reason for it. If the Court of Appeals failed to pass upon it or even rejected that defense, the petitioner is entitled to assert it in this Court.

Helvering vs. Gowran, 302 U. S. 238.

3. By ignoring these contentions and failing to pass upon the vital and controlling questions on the appeal, the Court of Appeals has "decided a federal question in a way in conflict with the applicable decisions of this Court," and "has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision."

United States Supreme Court Rules 38, 5 (b).

V

FACT

The lower Courts found, and all parties conceded the facts to be:

1. That petitioner is a manufacturer and seller of ice, doing business wholly in Shelby County, Tennessee, and all but 6.80% of its output is sold and delivered in that county; that 2% is an accident of manufacture, salvaged by selling it for car refrigeration; that this small part of its output is occasionally sold when called for and delivered to packers and carriers for passenger consumption and car refrigeration, frequently going into interstate commerce and being consumed by melting in the interstate journey.

Findings of Fact, R. pp. 58, 59;
Opinion District Court, R. pp. 46-49;
Opinion Court of Appeals, R. pp. 77-82.

2. It is, and has always been, conceded that refrigeration is a necessary utility in the transportation of perishable interstate freight.

3. Such ice, however, is not produced for transportation (that means being carried from place to place). It is produced in order to sell locally but is occasionally sold as a necessary utility used in transportation.

4. The ice is consumed in the use in the interstate journey. Therefore, the carrier buying it is the ultimate consumer. Such carrier is and can not be a producer of the ice, a manufacturer of the ice, nor does he process it. Therefore, the ice is produced not for transportation itself, but for general sale and is occasionally sold as one of the numerous elements and utilities which must be obtained in order to facilitate transportation.

LAW

1. There is no language in the Act that warrants the conclusion that a production of the various utilities used in and for interstate transportation constitutes a production for that commerce itself, rather than a production to be used in interstate commerce.

The things dealt with by plaintiffs and intervenors in this case could only have been one of two kinds: the freight which was transported, or the ice to cool that freight. No claimant had the least to do with the freight carried,—neither with the meat, fowl, vegetables, fruit, nor other perishables.

The packers, merchants and carriers, and their employees, produced, handled and worked on this freight

exclusively and it was transported in interstate commerce. The petitioner's employees all delivered, loaded and worked on only the ice, which the passengers used and which kept the freight cool and moist.

Construing and using the word "transport" and the word "shipped" in their usual, accepted, modern sense, such ice was not shipped nor transported at all (the Fourth Circuit Court of Appeals in the *Hamlet* case to the contrary, notwithstanding).

Formerly, when goods were loaded on a ship they were said to be "shipped," but here "shipped" is used in the sense of "transport." The ice was, of course, not transported because that plainly involves carrying it from place to place, and the ice was carried to no place, but was to be consumed on the cars where it was placed. So the plaintiffs and intervenors did not work on nor aid in either producing or transporting the refrigerated freight, but did work to make the ice that cooled such freight during its transportation. No plaintiff nor intervenor, therefore, either aided in producing the freight (neither fowl, fruit, vegetable, etc.), mined it, handled it, worked on it, nor transported it. Nor did any of them engage in any occupation or process necessary to that freight's production. They were in an occupation necessary to that freight's transportation, but the Act does not include any occupation or process necessary to transportation, so when the Court of Appeals holds that employees are within the Act who are engaged in an occupation or process necessary to the transportation of any commodity, the Court of Appeals simply imports a new provision into the Act.

2. Congress clearly intended to draw, by apt words, the legislative line between intrastate commerce and interstate commerce by excluding from the definition (Section 3(i)) of "goods for commerce" those goods which had been delivered into the physical possession of the ultimate consumer before their entry into interstate commerce. It drew the line where it naturally belonged, that is, at the entrance into interstate commerce. In drawing the line it removed that function from the Courts as far as it could. It wisely placed goods delivered to the ultimate consumer before entry into interstate commerce, in *intrastate* commerce. It, with equal wisdom, placed the goods not yet delivered to the ultimate consumer upon its entry into interstate commerce there, where it belonged. It thus made plain, clear and workable the legislative provisions.

The word "goods" in this Act always means "goods for interstate commerce."

Unless they are "for interstate commerce" neither the Act nor the Congress has any jurisdiction over the "goods." Therefore, whenever goods are the subject of the legislation they are "goods for interstate commerce." They are inseparable in their application in this legislation.

The word "after," which is applicable to a certain time, applies, therefore, not to the production of goods, nor to goods alone, but to the only sort of goods involved, that is "goods for interstate commerce" and the time referred to is naturally the time of their entry into interstate commerce.

The difficulty that has arisen about it has come from the Courts finding the purpose of Congress apart from and in spite of the legislative language.

The Court of Appeals held that petitioner's employees who were engaged in the production, transportation or delivery of ice intended for servicing interstate facilities (which meant selling and delivering ice for passenger consumption or car refrigeration) were engaged in the production of goods for commerce. The opinion actually says that an employee engaged in transporting or delivering ice for car servicing was engaged in producing that ice. It also says that the necessity for, and the close and substantial relationship of the production of the ice to interstate transportation of perishable freight brings it within the area of both the *Kirschbaum* and *Warren-Bradshaw* cases. These cases are far, indeed, from the case decided by the Court of Appeals.

Kirschbaum vs. Walling, 316 U. S. 517, and *Warren-Bradshaw Drilling Company vs. Hall*, 317 U. S. 88, both were held to come under the extended application of the word "produced" as defined by Section 3(j) (203(j)), so as to include employees engaged "in any process or occupation necessary to the production thereof (that is, to the production of the goods for interstate commerce) in any state."

In the *Kirschbaum* case the landlord's employees, who ran the elevators and furnished the heat and lighting to tenants of a loft building manufacturing interstate sold garments, were held to be engaged in an occupation necessary to the production of those garments. This service was, of course, plainly necessary to the production of the

garments, as they could not well have been made without heat, light and elevator service to the factory rooms.

Warren-Bradshaw Drilling Co. vs. Hall, supra, held that the employees of a well drilling outfit, if not engaged in mining or producing the oil destined for sale in interstate commerce by drilling for it, at least engaged in a process or occupation necessary to produce the oil.

It did not go beyond the explicit language of the Act to say the drilling for oil was a process or occupation necessary for the production of that same oil.

The *Kirschbaum* and *Warren-Bradshaw* cases were pioneers only in holding that the occupation of the immediate employer would be disregarded and the provisions of the Act make it wholly dependent upon the nature of the employees' activities, rather than the occupation of the immediate employer. The opinion of the Court of Appeals in this case adds a wholly new provision to the Act in Section 3(j) by extending the application of the word "produced" not only to any process or occupation necessary to the production of the goods for interstate commerce, but to any process or occupation necessary to the transportation of the goods. That Court has rewritten Section 3(j) so that Congress is made to say:

> "(j) 'Produced' means produced, manufactured, mined, etc., and for the purposes of this chapter any employee shall be deemed to have been engaged in the production of goods for interstate commerce if such employee was employed in * * * any process or occupation necessary to the production *or transportation* thereof in any state."

The word "transportation" is not in the Act, but it is in the reading of the Act by the Court of Appeals.

The *Kirschbaum* case made it rather plain that the Act would be construed as written and that legal distinctions would not be carried into it or permitted to cut it down. These two cases are only in point in overriding the Court of Appeals in this case.

(2) In the Court of Appeals opinion an apparent excuse is made for the District Court's opinion because it did not have certain cases from this Court and the Court of Appeals before it when that opinion was rendered. Attention is called to the fact that the opinion of the District Court is not opposed to, but is in entire accord with, the *Kirschbaum* case and the *Warren-Bradshaw* case and is not out of line with any of the decisions of this Court. Analytic comparison is invited between the District Court's opinion here and the opinions of the Courts of Appeals and District Courts in the *Hamlet Ice Company* case, the *Atlantic Ice Company* case, and the opinion in this case.

Hamlet Ice Co. vs. Fleming, 127 Fed. (2d) 165 (C.C.A. 4th Circuit);
Atlantic Ice Co. vs. Walling, 131 Fed. (2d) 518, (C.C.A. 5th Circuit);
Fleming vs. Atlantic Ice Co., 40 Fed. Supp. 654.
Opinion Chapman vs. Home Ice Co. (Not yet reported in Federal Reporter, R. pp. 77 et seq.)

This comparison becomes more pointed when met with the opinion of Judge Russell, whose reasons were affirmed and followed by the Fifth Circuit in the *Atlantic Ice Co.* case when he thereafter delivered the opinion in *Gaston vs. Dalton Ice Co.* (Not yet in Federal Reporter, 6 Labor Cases, 61,491).

(3) In this case the Court of Appeals first dealt with the exclusion of Section 3(i). It cited and apparentely relied upon the Court of Appeals for the Fourth Circuit in *Hamlet Ice Co. vs. Fleming.* 127 Fed. (2d) 165, and the Court of Appeals of the Fifth Circuit in *Atlantic Ice Co. vs. Walling,* 131 Fed. (2d) 518.

The opinion says that it agrees with the reasoning in the *Hamlet Ice Co.* case where the argument for the exclusion of the goods for commerce after their delivery to the ultimate consumer "was rejected * * * as unsound because the goods under consideration were not only the subjects of commerce, but entered into the very means of transportation by which the burdens of traffic were borne and that to exempt the producer would run contrary to the manifest purposes of the Act to eliminate all such standard labor conditions in respect to goods produced for transportation in interstate commerce." If this is in truth reasoning with which the Court of Appeals agrees, it is not seen to what result the reasoning leads. The ice under consideration might well have been the subject of interstate commerce, but it was not. It entered into the very means of transportation by which the burdens of traffic were borne, but entering into the means of transportation does not mean that the ice was produced for transportation, but it was only an article used in that transportation. To exempt the producer of the ice might run contrary to the purpose of the Act, but aside from being a merely unsupported conclusion it was not its manifest purpose, nor was the ice produced for transportation in interstate commerce. It might have been produced to furnish an ingredient, util-

ity or necessary article to transportation in interstate commerce, but no more. The opinion says:

> "It is idle, therefore, to deny that the production of ice intended for refrigeration of perishable merchandise in transportation is not a necessary element of transportation."

It is not denied. But when the Court says if, indeed, the production of this ice "is not also a 'part or ingredient' in production itself for ultimate consumer use," the meaning of the words is not understood. Of course the production of the ice is not a part or ingredient in production either of the perishable freight or the passengers who consume the ice water.

The Court of Appeals says, as pointed out in the *Hamlet* case:

> "The exclusion clause in 3(i) is intended to apply to goods which have come into the hands of the ultimate consumer after transportation is ended, and after they have been withdrawn from further traffic or sale."

and the *Hamlet* opinion so reads.

If that was the intention, the exclusion was meaningless because neither Congress nor the Act had anything to do with or could apply to goods which had already come into the hands of the ultimate consumer after the transportation was ended and after they had been withdrawn from further traffic or sale. In that event, interstate commerce had ended, the goods were at rest, and to limit the exclusion so as to affect the ultimate consumer after the transportation was ended and the goods withdrawn from traffic or sale is to import into a skill-

fully and well drawn Congressional Act a useless and meaningless provision.

The Court of Appeals referred to the *Atlantic* case, which will be next mentioned.

In *Atlantic Ice Co. vs. Fleming,* 131 Fed. (2d) 518, the Court of Appeals merely followed the language and reasoning of the District Judge, especially as to the exclusion clause in Section 3(i). It said the District Judge assumed, but did not decide that the non-inclusion provision merely exempted the ultimate consumer from the penalties of Section 15 (a) (1). That assumption is in the face of Section 3 (203 C.C.A.) which plainly said that these definitions applied to the entire Act of Congress. It said the District Judge made it clear that the construction for the exclusion would produce the absurd result of making the clause operate retroactively to destroy the character the goods had during their production as goods for commerce. It has already been pointed out that the District Judge made the result absurd by eliminating two words from Sections 6 and 7 of the Act in reading it altogether. It is plainly not absurd to say that goods produced for interstate commerce should not include goods delivered to the ultimate consumer before their entry into interstate commerce. On the contrary, it is the plain, consistent reading of an Act which evinces skillful and careful draftsmanship.

The District Judge was followed in the *Atlantic* case. His later opinion throws light upon his earlier decision.

In *Gaston vs. Dalton Ice Co.* (Ga.), Judge Russell had a suit by ice factory employees for underpayment of

their overtime under the same Act. The employer made sales to interstate carriers for car refrigeration in an irregular and occasional way as an incidental part of its local business, of which these sales constituted a very small part. Judge Russell, among other things, said:

> "Relation of Product to Interstate Commerce:
>
> 5. Ice as a product occupies a peculiar status with relation to commerce. When sold for refrigeration of interstate shipments it may or may not be the means whereby such commerce may be carried on, dependent upon the circumstances of each particular case. The evidence in this case fails to show that the production, deliveries and sales of the ice in question had such substantial relation to interstate commerce either in purpose or effect to constitute its production, deliveries and sales an essential part of interstate commerce.
>
> 6. There is a material difference between the question of degree of production of goods for commerce or engagement in commerce, if in fact such exists, and acts and transactions which may or may not constitute production for or engagement in commerce, dependent upon the circumstances of each case. If participation be shown, the degree, excepting only that not considered by reason of the doctrine of *de minimis*, is not material. However, in case of a product like ice, not itself an article of commerce, but which may be necessary to its carrying on, the manner and extent of use and employment in commerce does illustrate the question whether its manufacture and sale constitutes interstate commerce."
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> * * * * * *
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> "In the case of *Fleming vs. Atlantic Company*, 40 F. Supp. 654 (4 Labor Cases, 60,565), this Court held that under the circumstances in that case the ice produced by the defendant was produced for commerce

and that the employees engaged in the production and delivery of the output of certain ice plants of the defendant were engaged in the production of goods for commerce, and engaged in commerce, where such ice was produced for the purpose of supplying the requirements of carriers by rail, and to a certain extent by trucks, who were primarily engaged in interstate shipment of perishables and who daily relied only upon the output of such plants to supply necessary refrigeration, and where the ice was produced solely for the purpose of supplying such need. On appeal this decision was affirmed. *Atlantic Company vs. Walling,* 131 F. 2d. 518 (4 Labor Cases, 60,720). A similar ruling was made in *Hamlett Ice Company vs. Fleming,* 127 F. 2d. 165 (5 Labor Cases, 61,019). In the *Atlantic* case the entire production under consideration was produced for the purpose of use wholly for the purpose of carrying on the interstate shipment of perishable commodities. As stated in the opinion, ice in such circumstances, while not an article of commerce, is an essential instrumentality of commerce. However, as stated in conclusion of law above No. 6, in any specific case all the facts must be considered in determining whether under the circumstances presented the ice is produced for the purpose of, or in view of, commerce. The extent and manner in which the production is afterwards employed for the purpose of supplying the need of commerce is material in determining this question. Plainly stated, in view of the nature of the commodity produced or sold, each case must be determined on its own facts. While this acknowledges the inability of the Court to set up a definite standard of measurement upon which anyone engaged in such business may place its method of carrying on its business to determine if it squares with the terms of the statute, still a far more able Court has recognized the difficulty of laying down 'mathematical or rigid formulas' in deter-

mining the coverage of employees engaged in an occupation 'necessary to the production of goods for commerce.' It is recognized that in such instance 'the criterion is necessarily one of degree and must be so defined.' *Kirschbaum vs. Walling*, 316 U. S. 517 (Preliminary Print) (5 Labor Cases 51,142). In view of the nature of the product and the purpose for which the ice is used, it appears that those engaged in its production occupy, with reference to the question of whether they are engaged in the production of goods for commerce, a similar position to the employees who may or may not be engaged in an 'occupation necessary to the production of goods for commerce.' It is true that in the later instance it is the type of occupation and in the former it is the type of the product and its general use. Nevertheless the situation is not dissimilar. In the one case it is necessary to determine whether the work of the employees has such 'a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in occupation 'necessary to the production of goods for commerce,' (*Kirschbaum vs. Walling, supra*) and in the other it is the determination of whether the production and sale of the ice was for a purpose so intimately a part of commerce that its production constituted an essential part of the carrying on of commerce.

"It is this view of the matter which impels my conclusion that the tie in with the carrying on of commerce is not so substantial in the present case as to support a finding that the employees in question were engaged in the production of goods for commerce, or engaged in commerce."

(4) The difference in reasoning and the incorrect reasoning of the Courts of Appeals and District Court

leaves this matter in uncertainty and confusion and shows why certiorari needs to be granted in view of the fact that the question arises all over the country. This difference and that uncertainty are emphasized by the decision of the Supreme Court of Arkansas in *Couch vs. Ward*, 168 S.W. (2d) 822, not officially reported.

(5) The denial of certiorari in *Hamlet Ice Co. vs. Fleming*, 127 Fed. (2d) 165, is no doubt the real reason why the Courts of Appeal are in apparent agreement. That case was a strong one for the application of the Act. The factory was built away from the town and the local market. The construction of the plant and its appurtenances manifested intention to put its output in railroad cars; 75% of the output was sold to three interstate carriers by rail with whose tracks it had physical connection. Plainly, the business was conducted to make and sell ice to aid in interstate transportation. To have held the transaction a local one would have been to permit the tail to wag the dog, instead of letting the dog wag the tail. In other words, the plant was made for use in interstate transportation. The difference between the case and the one at bar is emphasized by Judge Russell's opinion, just mentioned, in *Gaston vs. Dalton Ice Co.*, 6 Labor Cases, No. 61491, and that of the Supreme Court or Arkansas in *Couch vs. Ward*, 168 S.W. (2d) 822.

This denial of certiorari, however, is the rock which stands in the way of a correct decision by the lower Courts. It should be clarified and the questions relating to the burden of proof should be decided and made plain. . .

It is to be doubted if in the *Hamlet* case the application and construction of the exclusion of goods in the hands

of the ultimate consumer could have been pressed upon the court as showing its practical harmony with constitutional limitations. It is a determinative and controlling feature of the Act in drawing a clear line between interstate commerce and intrastate commerce, which makes the Act workably simple.

The Circuit Court of Appeals should be reversed and the District Court should be affirmed.

In any and all events, the matters of defense not passed on in the Court of Appeals should be passed on and determined before there is another trial, because the question for decision was whether there should be a new trial, and it depended on questions left undecided.

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